No. 14921

United States
Court of Appeals
for the Ninth Circuit

CONTINENTAL FIRE AND CASUALTY INSURANCE COMPANY, and CLARENCE L. CALD

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-20-56

No. 14921

United States
Court of Appeals
for the Ninth Circuit

CONTINENTAL FIRE AND CASUALTY INSURANCE COMPANY,

Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act, and EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Franicsco, Calif.—1-20-56

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

ROY E. JACKSON, and
THOR P. ULVESTAD,

Attorneys for Appellant,

1207 American Bldg.,
Seattle, Washington.

CHARLES P. MORIARTY, and
EDWARD J. McCORMICK, JR.,

Attorneys for Appellee J. J. O'Leary,

1012 U. S. Courthouse,
Seattle, Washington.

BOGLE, BOGLE & GATES,

Attorneys for Appellee Employers Mutual Casualty Co. of Des Moines,

603 Central Bldg.,
Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3880

CLARENCE L. CALDWELL and CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant.

PETITION FOR INJUNCTION

For cause of action against the defendant, plaintiffs allege:

I.

That plaintiff, Clarence L. Caldwell, was, during all times material to this petition, an employee of the Northern Stevedoring and Handling Corporation at Seward, Alaska, where plaintiff Caldwell was employed as a longshoreman. That said Northern Stevedoring and Handling Corporation was engaged in loading and unloading vessels carrying cargo to and from Seward, Alaska.

II.

That the plaintiff, Continental Fire and Casualty Insurance Corp., is now and at all times herein

mentioned was an insurance company organized as a corporation under and by virtue of the laws of the State of Texas and an insurance carrier insuring the Northern Stevedoring and Handling Corporation at Seward, Alaska, covering employees engaged in longshore work, particularly the plaintiff, Clarence L. Caldwell, under the terms of the Act. That said Northern Stevedoring and Handling Corp. was an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act, hereinafter referred to as the "Act."

III.

That the defendant, J. J. O'Leary, is now and at all times hereinafter mentioned, was the Deputy Commissioner of the Fourteenth Compensation District under the provisions of this Act.

IV.

That plaintiff Clarence L. Caldwell on May 30, 1951, was employed by the Northern Stevedoring and Handling Corporation at Seward, Alaska, as a longshoreman and that while in the employ of the employer above named he sustained an injury to his back while engaged in unloading lumber aboard the S.S. "Seafair" which was afloat in the waters at Seward, Alaska. That on said date while using a peavy in prying on a timber, the peavy slipped, causing him to fall backwards and to strike his back against a piece of timber which caused severe pain in the spine and resulted in his leaving his work and necessitated his being hospitalized and under medical treatment at Seward, Alaska.

V.

That at the time plaintiff Caldwell was injured on May 30, 1951, the employer, Northern Stevedoring and Handling Corp., was insured by the Employers Mutual Casualty Co. of Des Moines. That following said injury plaintiff's employer did not report the injury to the Deputy Commissioner or the Longshoremen's and Harbor Workers' Commission but instead reported the injury to the Alaska Industrial Board and the Employers Mutual Casualty Co. of Des Moines paid temporary total disability to plaintiff Caldwell under the Alaska Compensation Act from May 30, 1951, to June 5, 1951. That plaintiff Caldwell returned to his work thereafter but continued to have pain in his back and difficulty in lifting and doing his work. That in order to be able to continue working plaintiff Caldwell obtained a back brace and wore the back brace continuously doing his work. That quick movements of his back caused severe pain in the back. That he consulted a Dr. Sellers who treated his back. That if he coughed hard or sneezed he would have severe pain in the back and pain in his legs, mostly in the left leg. That this condition in his spine existed since the accident on May 30, 1951, and he continued to wear his back brace down to October 10, 1953, and at that time had a permanent disability in his back from the accident of May 30, 1951.

VI.

That plaintiff Caldwell on October 10, 1953, was again in the employ of the Northern Stevedoring

and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred."

(f) "Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this chapter shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section."

X.

That the employer, Northern Stevedoring and Handling Corporation, at no time up to January 25, 1954, had made a report of plaintiff's injury of May 30, 1951, to the office of the Deputy Commissioner, therefore the Statute of Limitations had not run against the plaintiff Caldwell's claim for the injury which he received on May 30, 1951.

XI.

That under the Longshoremen's and Harbor Workers' Compensation Act it became the duty of the Deputy Commissioner to investigate the plaintiff Caldwell's claim filed on November 13, 1954, with respect to the injury that he received to his back and spine and to adjudicate said claim and determine his time loss and the extent of his permanent disability resulting from his injury of May 30, 1951.

XII.

That the Deputy Commissioner at no time following the filing of the report of injury on January 25, 1954, by said employer has adjudicated or attempted to adjudicate the plaintiff Caldwell's claim for the injury he sustained on May 30, 1951, and no determination was made by the Deputy Commissioner as to the time loss which he was entitled to for said injury, nor the extent of the disability that he had in his back and spine following said injury of May 30, 1951, down to and including October 10, 1953, in spite of the fact that the evidence produced by the plaintiff Caldwell indicated that he did have a definite disability of the spine following the injury of May 30, 1951, which required him to wear a back brace for his back to relieve him of the pain and suffering that he was enduring and to permit him to carry on his work, and the further fact that the attending physician, Dr. Ira McLemore had reported that it was his opinion that the plaintiff Caldwell did have a definite disability in the spine as the result of the in-

jury of May 30, 1951, at the time he sustained a further injury on October 10, 1953, when making a lift of a crate weighing four or five hundred pounds in company with other employees.

XIII.

That on about February 16, 1954, representatives of the Employers Mutual Casualty Company of Des Moines and representatives of the Continental Fire and Casualty Insurance Corp. met with the Deputy Commissioner at Seattle, Washington, at which time the plaintiff Caldwell was present and following said conference a dispute arose between the representatives of the Employers Mutual Casualty Company of Des Moines and the Continental Fire and Casualty Insurance Corp. as to who was responsible for the payment of the medical care and compensation to plaintiff Caldwell as the result of his injury which occurred on May 30, 1951, and the injury which he sustained on October 10, 1953, and as a result of this dispute a hearing before the Deputy Commissioner was requested by the parties.

XIV.

That on the 10th day of September, 1954, a hearing on said claim was held pursuant to the provisions of said Act before defendant J. J. O'Leary, Deputy Commissioner, which hearing resulted in a Compensation Order and Award of Compensation being filed by J. J. O'Leary, Deputy Commissioner, in his office on January 19, 1955, copy of which is attached hereto and marked Exhibit "A," and by

reference made a part hereof as though fully set forth.

XV.

That a certified copy of the transcript of testimony taken at said hearing, together with all exhibits filed and received in evidence in connection therewith will be filed in this cause under the certificate of said Deputy Commissioner, which said testimony and exhibits are by this reference made a part hereof and incorporated herein as though fully set forth.

XVI.

That it is admitted by the parties hereto that plaintiff Caldwell sustained an injury on May 30, 1951, while employed as a longshoreman on the S.S. "Seafair" at Seward, Alaska, and that on October 10, 1953, he sustained another injury to his back and spine while employed by the same employer while working aboard the S.S. "Seafair" at Seward, Alaska. The question presented is whether it was the duty of the deputy commissioner to adjudicate plaintiff Caldwell's claim of back injury of May 30, 1951, when said claim was filed in his office to determine the plaintiff's time loss as a result of said injury, and also to determine the permanent partial disability which the plaintiff suffered to his spine as a result of said injury, and treatment to which he was entitled as a result of said injury.

It is the plaintiffs position that the deputy commissioner was duty-bound to adjudicate plaintiff's claim of injury of May 30, 1951, and to determine

his time loss, permanent partial disability and treatment he was entitled to receive as a result of said injury, before he adjudicated the claim of injury of October 10, 1953, and made the award referred to herein.

XVII.

That said Compensation Order and Award of Compensation of the Deputy Commissioner being not in accordance with the law should be suspended and set aside.

XVIII.

That less than thirty days have elapsed since the entry and filing of said Compensation Order and Award of Compensation and the plaintiffs have no relief or adequate remedy at law.

Wherefore, Plaintiffs pray for judgment as follows:

1. That a decree be entered herein adjudging said Compensation Order and Award of Compensation dated January 19, 1955, and attached hereto and made a part hereof as Exhibit "A," to be unlawful and contrary to the provisions of said Act, and directing that said Award be suspended and set aside and that the defendant be enjoined from enforcing the same.

2. For such other, further or different relief as to the court may seem equitable and just.

/s/ ROY E. JACKSON,
Attorney for Plaintiffs.

EXHIBIT "A"

(Copy)

U. S. Department of Labor
Bureau of Employees' Compensation
Fourteenth Compensation District
Case No. 943-91

In the Matter of:

The Claim for Compensation Under the Longshoremen's and Harbor Workers' Compensation Act

CLARENCE L. CALDWELL,

Claimant,

vs.

NORTHERN STEVEDORING AND HANDLING CORP.,

Employer,

and

CONTINENTAL FIRE AND CASUALTY INSURANCE CORP.,

Insurance Carrier.

COMPENSATION ORDER
AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

Findings of Fact

That on the 10th day of October, 1953, the claimant above named was in the employ of the employer

above named at Seward, in the Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Continental Fire and Casualty Insurance Corporation; that on said day, the claimant herein, while performing service as a Longshoreman for the employer and engaged in discharging cargo from the S.S. "Seafair," which was afloat at the Army Dock, sustained personal injury resulting in his disability when, while lifting a crate weighing about four or five hundred pounds in company with three other employees he experienced a sudden pain in his lower back and legs; that he was admitted to the Seward General Hospital on October 11, 1953, where he remained until October 31, 1953, when he was transferred to the Providence Hospital in Seattle, Washington, and on November 13, 1953, a sub-total laminectomy and fusion of the lumbosacral area of his spine was performed; that written notice of injury was not given within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of Section 7(a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to $5,200.00; that as a result of the injury sustained, the claimant was wholly disabled from October 10, 1953, to September 30,

1954, inclusive, and he is entitled to 50 6/7 weeks' compensation at $35.00 for such temporary total disability; that beginning October 1, 1954, the disability of the claimant became permanent in character, causing a loss of wage-earning capacity equivalent to 30% of his average weekly wage at the time of his injury, and he is entitled to compensation at the rate of $20.00 per week (⅔ of the difference between his average weekly wage of $100.00 at the time of his injury and his reduced wage-earning capacity of $70.00 per week) for such permanent partial disability; that the compensation for temporary total disability amounts to $1,780.00; that the accrued compensation for permanent partial disability from October 1, 1954, to January 13, 1955, inclusive, a period of 15 weeks, amounts to $300.00; that the compensation for temporary total and permanent partial disability to January 13, 1955, amounts to $2,080.00; that the employer and insurance carrier have paid to the claimant the amount of $1,780.00 as compensation.

That on November 13, 1953, the claimant filed a claim for compensation in the office of the undersigned Deputy Commissioner alleging that on May 30, 1951, while in the employ of the employer above named he sustained an injury while engaged in handling lumber aboard the S.S. "Seafair," which was afloat at Seward, Alaska, and that on said date, while using a peavey on a timber, the peavey slipped causing him to fall backwards and to strike his back against a piece of timber, in consequence of

which he is reported to have sustained a strained back; that no report of said injury was filed with the undersigned Deputy Commissioner by the employer until January 25, 1954; that the injury was, however, reported to the Alaska Industrial Board at Juneau, Alaska, and the claimant was paid compensation in the amount of $35.75 for temporary total disability from May 30, 1951, to June 5, 1951; that the medical reports submitted in connection with said injury indicated the claimant suffered a strained back; that subsequent to his return to work on or about June 6, 1951, the claimant was able to work whenever work was available although he had at various times experienced recurrent back pain; that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named.

Upon the foregoing facts, the Deputy Commissioner makes the following:

Award

That the employer, Northern Stevedoring and Handling Corporation, and the insurance carrier, Continental Fire and Casualty Insurance Corporation, shall pay to the claimant compensation as follows: 50 6/7 weeks at $35.00 per week for temporary total disability from October 10, 1953, to September 30, 1954, inclusive, in the amount of $1,780.00 and for permanent partial disability 15 weeks at $20.00 per week from October 1, 1954, to

January 13, 1955, inclusive, in the amount of $300.00 or a total of $2,080.00. The employer and insurance carrier having already paid the amount of $1,780.00, there is due and payable accrued compensation in the amount of $300.00, which the employer and carrier are directed to pay forthwith in one sum and thereafter shall Continue payments of compensation in bi-weekly installments at the rate of $20.00 per week subject to the limitations of the Act or until otherwise ordered.

Given under my hand at Seattle, Washington, this 19th day of January, 1955.

J. J. O'LEARY,

Deputy Commissioner, Fourteenth Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, and the insurance carrier, at the last known address of each as follows:

Mr. Clarence Caldwell, Seward, Alaska.

Northern Stevedoring & Handling Corp., Seward, Alaska.

Continental Fire & Casualty Insurance Corp., c/o Morrell P. Totten & Company, American Building, Seattle, Wash.

Regular Mail:

Employers Mutual Casualty Company, c/o Pacific Insurance Adjusters, Exchange Building, Seattle, Washington.

Bogle, Bogle & Gates, Attorneys-at-Law, Central Building, Seattle, Washington.

Mr. Roy E. Jackson, Attorney-at-Law, American Building, Seattle, Wash.

Bureau of Employees' Compensation, Washington 25, D. C.

J. J. O'LEARY,
Deputy Commissioner.

Mailed: January 19, 1955.
JJO:am.

ph

[Endorsed]: Filed February 11, 1955.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the Above-Entitled Court:

You will please file the Petition for Injunction and serve:

Copies on Mr. J. J. O'Leary.
1 copy on Bogle, Bogle & Gates.
1 copy on U. S. Attorney.
2 copies on Attorney General.

ROY E. JACKSON.

[Endorsed]: Filed February 11, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Roy E. Jackson, plaintiff's attorney, whose address, 1207 American Bldg., Seattle 4, Wash., an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: February 11, 1955.

MILLARD P. THOMAS,
Clerk of Court.

/s/ J. THORNBURGH,
Deputy Clerk.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Return on Service of Writ

I hereby certify and return, that on the 11th day of February, 1955, I received this summons and served it together with Petition for Injunction herein as follows:

Served J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation

Act by handing to and leaving a true and correct copy thereof with him personally at 905 2nd Ave., Seattle, Wash., on February 15, 1955, at 2:25 p.m., and by handing to and leaving a true and correct copy thereof with Edward J. McCormick, Jr., Assistant United States Attorney for the Western District of Washington at Seattle, Washington, on February 14, 1955, and by mailing by registered mail two true and correct copies thereof to the Attorney General of the United States at Washington, D. C., on February 15, 1955.

W. B. PARSONS,
United States Marshal.

By /s/ JAMES M. CLARK,
Deputy United States
Marshal.

[Endorsed]: Filed February 17, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT THEREOF

Comes now the defendant J. J. O'Leary, through his attorney, and moves the above-entitled Court for an order dismissing the petition filed herein on the grounds that it fails to state a claim upon which relief can be granted, as appears more clearly from the exhibits attached hereto, being the Official Report of Proceedings in this matter before J. J. O'Leary on September 10, 1954, and December 10,

1954, in two volumes, together with the exhibits entered in those proceedings, being marked: Exhibit #1, Employers Mutual Casualty Co. of Des Moines; and Exhibits 1 to 6, Continental Fire & Casualty Co., together with the Compensation Order of J. J. O'Leary dated January 19, 1955, which is set out subsequently in full; and the memorandum incorporated herein.

Procedural Statement and Compensation Order

The complaint seeks to have the court review and set aside as not in accordance with law a compensation order filed by the Deputy Commissioner on January 19, 1955, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C., Sec. 901, et seq. In said compensation order, the Deputy Commissioner awarded compensation to the plaintiff employee on account of a back injury sustained on October 10, 1953, while the plaintiff insurance company was the compensation carrier; the Deputy Commissioner specifically found that "the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named," at which time a different insurance company was the compensation carrier.

The Compensation Order

In the compensation order complained of, the Deputy Commissioner found the facts to be in part as follows:

That on the 10th day of October, 1953, the claimant above named was in the employ of the employer above named at Seward, in the Territory of Alaska, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Continental Fire and Casualty Insurance Corporation; that on said day, the claimant herein, while performing service as a Longshoreman for the employer and engaged in discharging cargo from the SS Seafair, which was afloat at the Army Dock, sustained personal injury resulting in his disability when, while lifting a crate weighing about four of five hundred pounds in company with three other employees he experienced a sudden pain in his lower back and legs; that he was admitted to the Seward General Hospital on October 11, 1953, where he remained until October 31, 1953, when he was transferred to the Providence Hospital in Seattle, Washington, and on November 13, 1953, a sub-total laminectomy and fusion of the lumbosacral area of his spine was performed; * * * that as a result of the injury sustained, the claimant was wholly disabled from October 10, 1953, to September 30, 1954, inclusive, and he is entitled to 50-6/7 weeks' compensation at $35.00 for such temporary total disability; that beginning October 1, 1954, the disability of the claimant became permanent in character causing a loss of wage-earning capacity equivalent to 30% of his average weekly wage at the time of his injury, and he is entitled to com-

pensation at the rate of $20.00 per week (⅔ of the difference between his average weekly wage of $100.00 at the time of his injury and his reduced wage-earning capacity of $70.00 per week) for such permanent partial disability; * * *

That on November 13, 1953, the claimant filed a claim for compensation in the office of the undersigned Deputy Commissioner alleging that on May 30, 1951, while in the employ of the employer above named he sustained an injury while engaged in handling lumber aboard the SS "Seafair" which was afloat at Seward, Alaska, and that on said date, while using a peavey on a timber, the peavey slipped causing him to fall backwards and to strike his back against a piece of timber, in consequence of which he is reported to have sustained a strained back; that no report of said injury was filed with the undersigned Deputy Commissioner by the employer until January 25, 1954; that the injury was, however, reported to the Alaska Industrial Board at Juneau, Alaska, and the claimant was paid compensation in the amount of $35.75 for temporary total disability from May 30, 1951, to June 5, 1951; that the medical reports submitted in connection with said injury indicated the claimant suffered a strained back; that subsequent to his return to work on or about June 6, 1951, the claimant was able to work whenever work was available although he had at various times experienced recurrent back pain; that the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability

rather than the minor injury which he sustained on May 30, 1951, while in the employ of the employer above named.

Questions Presented

In paragraph XVI of the complaint it is alleged:

That it is admitted by the parties hereto that plaintiff Caldwell sustained an injury on May 30, 1951, while employed as a longshoreman on the SS "Seafair" at Seward, Alaska, and that on October 10, 1953, he sustained another injury to his back and spine while employed by the same employer while working aboard the SS "Seafair" at Seward, Alaska. The question presented is whether it was the duty of the deputy commissioner to adjudicate plaintiff Caldwell's claim of back injury of May 30, 1951, when said claim was filed in his office to determine the plaintiff's time loss as a result of said injury, and also to determine the permanent partial disability which the plaintiff suffered to his spine as a result of said injury, and treatment to which he was entitled as a result of said injury.

It is the plaintiff's position that the deputy commissioner was duty-bound to adjudicate plaintiff's claim of injury of May 30, 1951, and to determine his time loss, permanent partial disability and treatment he was entitled to receive as a result of said injury, before he adjudicated the claim of injury of October 10, 1953, and made the award referred to herein.

In the same paragraph plaintiffs allege that the Deputy Commissioner was bound to adjudicate the

plaintiff's claim of injury of May 30, 1951, before he adjudicated the claim of injury of October 10, 1953.

The Evidence

Plaintiffs in their complaint do not challenge the findings of fact made by the Deputy Commissioner in his compensation order. The resumé of the evidence given below is for the purpose, not of showing that the findings as to the two injuries are supported by evidence, but merely for the purpose of familiarizing the court with the evidence in the case.

At the hearing before the Deputy Commissioner on September 10, 1954,

Clarence L. Caldwell, the plaintiff, testified in part as follows: That on May 30, 1951, he was injured when a peavey slipped as he was trying to pry apart two bundles and he went over backwards striking his back on a bundle of lumber or plywood or plasterboard (Tr. 10); that following his fall on May 30, 1951, he worked the rest of that shift, and on the next day (he believed it was) he went to see Dr. Shelton who put him in Seward General Hospital (Tr. pp. 10 to 11); that he was in the hospital five days and upon his return to work he had backache and pains when he got into certain positions (Tr. 12); that he did not continue under the care of Dr. Shelton (Tr. 12 to 13); that there were days the "job was too hard" for him and he would go home (Tr. 13); that after seeing a Dr. Sellers who told him it was his sacroiliac

that was giving him trouble he got a back brace (in February or March of 1952) (Tr. 14); that on October 10, 1953, he helped to lift a crate that probably had a little more weight than he had lifted at other times and he "seemed to lose control of everything below the hips"; that the crate contained a deep freezer which weighed four or five hundred pounds (Tr. 15); that he went home right away, went to bed and the next morning went to the hospital where he consulted Dr. Deisher; that he remained under Dr. Deisher's care until he came to Seattle on November 2, 1953, where he was treated by Dr. McLemore and an operation on his back was performed on November 13th (Tr. 16); that he is still under Dr. McLemore's care who had not released him for work (Tr. 16 to 17); that he considered the injury of May 30, 1951, "more or less of a twist or sprain" and that is how he and the doctor treated it; that after such sprain he continued to work for seven hours on the shift (Tr. 19); that after such sprain he did not consult Dr. Shelton for two days [claimant having previously testified he believed he consulted Dr. Shelton the next day]; that he went to Dr. Shelton's office on that occasion and Dr. Shelton told him he had a slight sprain of the muscles of the back (Tr. 20); that he left the hospital on June 6, 1951, at which time Dr. Shelton advised him he could return to work; that stevedoring work in Seward is not daily work but depends upon how many boats are in (Tr. 21); that some months stevedores work only two or three days (Tr. 22); that the first physician he consulted after he had

consulted Dr. Shelton was Dr. Sellers, a period of eight or nine months later although he was experiencing almost constant daily pain (Tr. 26); that in lifting the crate onto the deck of the ship he turned away from it so as to give him "more room to step over" and experienced a sharp pain in the lower part of his back (about at the belt line) and in his legs (Tr. 33 to 34); that the pain was "in the small of" his back and was shooting down his hips and legs (Tr. 34); that the pain was severe and more than he had been having because he had lifted too much weight; that the injury of October 10, 1953, occurred about 4:00 o'clock and he went home about 4:30 after waiting for the dispatcher to arrive and without finishing the shift (Tr. 35); that he went to the hospital the next morning where he remained about three weeks and where he was placed in a body cast before being sent to Seattle (Tr. 36); that x-rays were taken at the Seward hospital and he was in a body cast when he arrived in Seattle (Tr. 37); that Dr. Sellers gave him treatment for his sacroiliac, snapping his back "more or less like a chiropractor would" (Tr. 45); that such treatments (about three in number) seemed at times to ease his back condition temporarily (Tr. 45 to 46); that Dr. Sellers also prescribed heat treatments and hot baths (Tr. 46); that, other than recommending the use of a back brace and a heat pad, Dr. Sellers prescribed no other treatment (Tr. 52).

Dr. Ira O. McLemore, a witness called by the plaintiff carrier, testified in effect that he examined the claimant at Providence Hospital, Seattle, on No-

vember 2, 1953, x-rays were taken which disclosed evidence of partial lumbarization of the first sacral segment and a spinal (pantopaque) study was made on November 5th (Tr. 60, 63, 64); that a filling defect between the fifth and sixth lumbar vertebra was noted which he felt was due to a rupture of the nucleus pulposus, and he recommended a subtotal laminectomy, removal of the nucleus, and a fusion of this area, due to the fact there was the pre-existing malformation, which operation was performed on November 11th; that certain definite adhesions appeared about the nerve roots with evidence of the previous malformation as noted in the x-rays (Tr. 64); that he thinks the claimant's injury of May 30, 1951, had a bearing on claimant's condition on November 2, 1953, because the history given by the claimant indicates he had not completely recovered from its effects and claimant had additional injuries superimposed on the condition (in the accident of October 10, 1953) (Tr. 67 to 68); that claimant had two conditions—a ruptured necleus with adhesions about the nerve roots, and the malformation of the spine the cause of which is an inherent weakness of the area with which back and leg pains are frequently associated (Tr. 68 to 69); that, while he thinks the adhesions existed for "some period of time," they cannot tell at surgery when they did occur (Tr. 69); that he thinks claimant's pain down his leg, following the May 30, 1951, strain, was due to the adhesions (Tr. 69 to 70); that he thinks the adhesions would be associated with the accident of May 30, 1951, (Tr. 70); that he does not know of his own knowledge of

the extent of injury from the May 30, 1951, injury (Tr. 72); that following claimant's second injury of October 10, 1953, claimant was in a condition of total disability; that when he first examined claimant he suspected there might be present a herniated disc (Tr. 73); that although atrophy is sometimes present in such cases, he has no notation of finding atrophy in claimant's left leg (Tr. 74); that he found no reflex changes, which changes are present sometimes in such cases; that claimant had a marked, chronic weakness of the spine because of the malformation with which claimant was born (Tr. 75); that such a malformation usually tends to make an unstable back; that he did not determine from the appearance of the adhesions how old they were (Tr. 76); that a congenitally-weak spine probably tends to develop adhesions more than the average, and adhesions sometimes result from infection; that the possibility exists that claimant's adhesions were due to either infection, congenital weakness, or injury (Tr. 77); that, from the history given by claimant, he thinks the adhesions occurred at the time of the injury two years previously, but he could not tell their cause from looking at the spine; that it appears claimant's preexisting condition had been aggravated by the second injury of October 10, 1953 (Tr. 78).

At the hearing before the Deputy Commissioner on December 10, 1954,

Dr. Bernard E. McConville, a witness called by the Employers Mutual Casualty Company of Des the back. The physician's report attached to the

Moines, testified in part as follows: that he has specialized in orthopedic surgery since 1937 (Tr. 89 to 90); that he reviewed the report of Dr. McLemore (Tr. 90); that claimant's sixth lumbar vertebra is a congenital malformation and any such malformation tends to weaken, mechanically, the structure of the spine and make it prone to injury (Tr. 92 to 93); that such congenital defect developed since the claimant was born through the formative years; that the deformity of claimant's facets, which may be likened to a pair of door hinges, is also a part of the congenital malformation or weakness of the joint (Tr. 93); that since birth claimant had a weak lumbosacral joint which causes intermittent periods of back discomfort and made him more prone to injury (Tr. 94 to 95); that adhesions are scar tissue formations that develop secondarily to an inflammatory process (Tr. 95); that claimant may have had "minor disability" from the strain of May 30, 1951, but because of his complete collapse following the injury of October 10, 1953, it is his opinion the second injury was the producing factor of claimant's present disability; that he does not believe that claimant's adhesions, diagnosed post-operatively as adhesive arachnoiditis, would have existed since claimant's first injury without disabling him before his complete collapse immediately following the injury of October 10, 1953, (Tr. 98); that such condition developed as a result of a definite episode [the second injury], the impingement of the nerves going down claimant's left leg apparently being the cause of his immediate work stoppage; that he feels such condition was

due to the second injury because the claimant had been able to work for over two years following the back strain of May 30, 1951, (Tr. 98 to 99); that he does not think such adhesions could have existed since the first injury since claimant would have had more of a reaction if they had so existed; that an inflammatory process such as adhesions has a relatively short period in which it develops and has either to burn suddenly or burn out (Tr. 99); that claimant is more prone to have back pain even from posture [such as the pain following the back strain of May 30, 1951, as to which claimant testified] (Tr. 100); that, while claimant could have had disability from the first injury, claimant may, over the years, have gradually developed a weakness of his back necessitating a back brace, but claimant "very distinctly had a severe second injury" (Tr. 104-105); that the fact that claimant, on examination by Dr. McLemore, had definite muscle spasm after being in a cast (following the second injury) would indicate that claimant "had something severe" [resulting from the second injury] that has happened over and above [claimant's condition following the first injury], because if he had had a severe degree of muscle spasm any place* * * he wouldn't be able to work [following the first injury] (Tr. 109 to 110); that he does not think claimant's adhesions could have existed since the injury of May 30, 1951, but thinks they would have occurred within a few weeks of the time Dr. McLemore operated on the claimant (Tr. 113); that most of the pain in claimant's congenitally deformed back

would be muscular pain, which is the reason claimant got relief from wearing a belt or back brace or from sleeping on a hard bed, thereby allowing the muscles to relax (Tr. 115); that the nerve pain in claimant's leg could have been caused by increased muscle tightness in the area of weakness in claimant's back (Tr. 115 to 116); that persons with sacroiliac slip get a kink in their back and neuralgia down the leg but it is not a definite pinching of the nerve root so as to give a definite, permanent pattern of pain (Tr. 117).

There was received in evidence as Exhibit No. 1 of the Employers Mutual Casualty Company of Des Moines, the deposition of Dr. J. H. Shelton taken on September 7, 1954, at Anchorage, Alaska. This deposition shows in effect that Dr. Shelton saw the claimant at the hospital following his injury of May 30, in 1951, and diagnosed claimant's condition as sprained muscles of the back. No X-rays were indicated and none were taken. The claimant was put back to work in about a week and Dr. Shelton saw him no further, after having prescribed heat and rest. No type of back brace or support was prescribed by Dr. Shelton, and he had no reason for thinking the claimant suffered any permanent damage to his back. According to Dr. Shelton's recollection, claimant was not hospitalized but was treated as an outpatient in Dr. Shelton's office in the hospital, but Dr. Shelton would not dispute claimant's testimony that he was hospitalized. Claimant's only symptoms were painful muscles of

report and made a part thereof by stipulation shows that the injury on May 30, 1951, as "sprained muscles of the back," that claimant was admitted to the hospital on June 3d and discharged on June 6th, 1951; that no further treatment was needed and that patient would be able to resume his regular work on June 8, 1951.

There were also received in evidence as Exhibits Nos. 1 to 6 of the plaintiff carrier depositions of claimant's co-workers on their observation of claimant at work; they do not show much beyond the fact that claimant had two injuries and that claimant generally worked his regular shifts after the first injury.

In Paragraph XVI of the Complaint, the plaintiff-carrier admits that the employee Caldwell sustained an injury on October 10, 1953, while employed by Northern Stevedoring and Handling Corporation. As mentioned above, the plaintiff-carrier does not allege that the findings of fact of the deputy commissioner in relation to the fact of injury and the fact of physical disability, as well as the fact of loss of wage earning capacity, are not supported by the evidence. In the absence of any allegation with respect to these factors, the complaint must be taken as raising no question whatsoever concerning the correctness of findings of fact heretofore made.

The question naturally arises: What is it then that the plaintiff-carrier seeks to show by way of

error on the part of the deputy commissioner? In the same Paragraph XVI plaintiff-carrier asserts that the question is whether it was the duty of the deputy commissioner to adjudicate the employee's claim arising from an injury on May 30, 1951, and to determine the alleged permanent partial disability which the plaintiff suffered to his spine as the result of said injury, as well as the treatment to which he was entitled on account thereof.

It will be seen therefore that the allegation of complaint is not directed to any error referable to the compensation order before the Court. Accordingly, the complaint should be dismissed for the very obvious reason that under section 21(b) of the Compensation Act (33 U.S.C. 921(b)) the only matter which properly can be raised is a matter in relation to the contents of the compensation order supported by proof in respect thereto, that the compensation order is "not in accordance with law." The compensation order in the present case could be examined indefinitely without it ever disclosing on its face any apparent error. Moreover, should the compensation order be read in the light of the evidence contained in the transcript of testimony there is nothing in that evidence which makes any finding inappropriate. It is well settled law that the court on judicial review will not search a record to find support for an omnibus assertion of error or to supply a justiciable issue which the plaintiff does not supply. "We are not compelled to search the record for undesignated error claimed

upon an omnibus assertion." North Whittier Heights Citrus v. National Labor Relations Board, 109 F. 2d 76 (C.A. 9, 1940), certiorari denied 310 U.S. 632. A petitioner is required to point out with particularity which of the findings of fact in the administrative order complained of are not supported by evidence, a general allegation being insufficient, and the court will grant a motion attacking the complaint for insufficiency. Royal Baking Powder Company v. Federal Trade Commission, 1 Stats. and Decs. Fed. Trade Com. 715 (C.A. 2, 1921); John C. Winston Company v. F.T.C., same 716 (C.A. 3, 1924); Oppenheim, etc., v. F.T.C., same 717 (C.A. 4, 1924); these cases are cited in Pike & Fischer Administrative Law, Vol. 1 (Background Digest, Key 63g.311). A petitioner is required to state wherein an order is erroneous. Moir v. F.T.C. same 718 (C.A. 1, 1925); Stuart v. Federal Communications Commission, 105 F. 2d 788 (App. D.C. 1939); mere conclusions of law in a petition for review of a compensation order are not sufficient. Perry v. U. S. Employees' Compensation Commission, et al., 27 F. 2d 144 (Cal. 1928), a Longshoremen's Act case. Accord: Hainey v. Tunnel Coal Co., 93 Conn. 90, 105 A. 333 (1918); Greenwood v. Luby, 105 Conn. 398, 135 A. 578 (1926); Russitte v. Otis Steel Co., 12 Ohio App. 189 (1919).

Assuming that the relief sought by the plaintiff-carrier were granted (namely, that this Court should require the deputy commissioner to determine and adjudicate the employee's claim in respect

to his back injury of May 30, 1951), notwithstanding such action that adjudication would not in any event have any bearing upon the correctness of the compensation order before the Court. It is obvious from the complaint that the plaintiff-carrier has misconstrued the underlying fundamental basis for the payment of compensation under the Longshoremen's Act. Compensation is paid under that Act in cases of injury such as the present one, not on the basis of any loosely construed notion of "disability" in a physical sense, but on a very definite and specific basis founded upon the loss of employee's wage-earning capacity due to injury.

Plaintiff-carrier seems to be of the view that determination of compensation under the Act is made on the basis of physical loss or physical impairment, the plaintiff's implied assumption being that an able-bodied man is 100 per cent physically capable, but that an injury in the compensation sense diminishes from the 100 per cent the physical capabilities of the injured man and compensation is to be paid for this lack of physical vigor. This is not the case, and since it is not the case, the plaintiff's interest in the effects of the injury of May 30, 1951, is irrelevant.

In determining compensation under the Longshoremen's Act (except for scheduled losses not here involved), the two factors which control the amount of compensation to be paid are: (1) the wages at time of injury and (2) the wages of the

employee thereafter, if he has capacity to earn wages. If he has no capacity to earn wages after injury, the disability is necessarily total. It is a well-known fact that many employees who have prior physical anomalies, disabilities and conditions work and have varying capabilities of earning their livelihood.

When an employee is injured, the Act requires the deputy commissioner to ascertain the average weekly wages at the time of that injury. If the employee returns to work the capacity of the employee to earn after the injury is examined to see whether the accident diminished that capacity. If so, the employee receives compensation for such capacity as the injury has destroyed. That is precisely what the deputy commissioner did in the present case. He determined the wages at the time of the injury and he then determined that the employee was incapable because of the injury of returning to work and therefore had, for the time being, total loss of earning capacity. The only proper question which the plaintiff-carrier could have presented in the present case (but which it did not present) is whether the 1953 injury currently produced diminution of wage earning capacity according to the present evidence. The findings on this point not having been challenged, they of course are final and binding on this plaintiff It is the duty of a plaintiff to show wherein findings of fact are not supported by the evidence and there is a presumption that the findings of fact of the

deputy commissioner are correct: Anderson v. Hoage, 63 App. D.C. 169, 70 F. 2d 773 (1934); Luckenbach Steamship Co., Inc., v. Norton, 96 F. 2d 764 (C.A. 3, 1938); Burley Welding Works, Inc., v. Lawson, 141 F. 2d 964 (C.A. 5, 1944).

The plaintiff-carrier did not contest before the deputy commissioner the fact that the employee before injury in fact (a) performed work for the employer (Northern Stevedoring) and (b) that he received a certain wage for that work. Nor did the plaintiff-carrier contest the amount of the then wage as not truly representing the then wage-earning capacity of the employee. If the 1953 injury was the cause of the employee ceasing to perform the work he had done immediately prior thereto, then of course it was the 1953 injury which was responsible for the subsequent wage loss. After the 1953 injury, it could not have been the 1951 injury which caused the loss, because (in the absence of a challenge) the claimed rate of wages asserted by the employee as his earned wage at the time of the 1953 injury, would necessarily have to be accepted by the deputy commissioner as wages then earned in exercise of wage-earning capacity. The wages obviously were not given to the employee as an unearned gift. In the absence of such a challenge, supported by proof that the employee was not worth what he was being paid at the time of the second injury, the deputy commissioner could not do other than accept as a fact the earning capacity of the employee as shown by the amount of the

wage which was then paid to him by his employer. What the employee actually lost by reason of his 1953 injury was his 1953 wage-earning capacity, a capacity established by work and earnings, which was not denied by plaintiff.

It will be noted from the foregoing that the deputy commissioner's determination of the facts (1) that the employee worked in 1953, (2) that he was paid a certain wage in 1953 prior to the injury of 1953, and (3) that subsequent to the October 10, 1953, injury he was unable to continue to earn that wage because that injury causing him to have total loss of wage-earning capacity, necessarily required the kind of findings that the deputy commissioner made, and which of course are not complained of. If the deputy commissioner had determined anything whatsoever with respect to the 1951 injury, that determination would not in the least have altered any of the indisputable facts just mentioned, and could not have affected the amount of compensation those facts, arising from and in connection with the 1953 injury, would have supported. Accordingly, while we deny that the plaintiff-carrier has any right to have an injury claim decided with respect to which it could not possibly have been an interested party, we go further and assert that the adjudication of that claim would have no bearing on the merits of or the result reached in respect to the claim filed, on account of the 1953 injury. This is because com-

pensation is paid for wage loss and not for physical damage as such.

As above stated, it is obvious from the plaintiff-carrier's statements that plaintiff-carrier in some fashion has arrived at the conclusion that "disability" for which compensation was awarded in this case compensates the employee on the basis of physical impairment. The carrier's second implied premise is that this being so, it is possible to split the physical impairment which the employee has suffered into two parts, charging one part to the 1951 injury and the other part to the 1953 injury. Even a casual reading of the Longshoremen's Act will show that this premise is utterly without statutory foundation. The compensation is of course paid on the basis of loss of wage-earning capacity and not for loss of physical capacity. Any diminution of an employee's earning capacity, whether due to a prior childhood or other injury or to physical anomalies or to prior occupational or non-occupational causes of whatever nature, if these physical conditions do in fact hinder ability to earn, in the nature of things they are necessarily expected to show up in the employee's wages. Accordingly, if the physical conditions are really effective hindrances to earning a living, the wage-earning capacity of the employee is pro tanto diminished. The Act contemplates that the effects of conditions of this sort (and we include here any physical impediment to working effectively that might have resulted from the employee's 1951 injury) would

be expected to be reflected in diminished capacity to earn. If in the present case the 1951 injury did have any such effect in 1953, it may properly be inferred that diminished capacity showed up in the earnings which the employee had just prior to his injury of October 10, 1953, whether or not looked for by anyone. The earnings on that date represented his wage-earning capacity whether or not diminished, since the plaintiff-carrier did not contend or show otherwise or establish that the employee was favored by his employer and was not in fact earning his pay. This being so, it is obviously unimportant what the deputy commissioner would have found with respect to the 1951 injury, because any findings made could not have changed the fact that in October, 1953, the employee admittedly earned a certain quantum of wages and that he did not continue to earn that quantum because of the 1953 injury—he being totally incapacitated on account of the 1953 injury.

The law is well settled that if a new injury adds to or aggravates an underlying pathological weakness or condition to the point that it produces further loss of wage-earning capacity, the employer in whose employ the disabling injury occurred is liable for all the consequences of that injury whether it produces total or partial disability. Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157 (1918); Prince Chevrolet Company v. Young, 187 Okl. 253, 102 P. 2d 601 (1940); Borstel's case, 307 Mass. 24, 29 N.E. 2d 130 (1941);

Billington v. Great Lakes Dredge and Dock Company, 263 A.D. 1040, 33 N.Y.S. 2d 703 (1942); Grieco v. C. R. Daniels, Inc., 17 N.J. Misc. 393, 9 A. 2d 671 (1940); Taylor v. Federal Mining and Smelting Company, 59 Idaho 183, 81 P. 2d 728 (1938); Hajek v. Brown, 255 A.D. 729, 6 N.Y.S. 2d 821 (1939); Maloney v. Utility Roofing Co., 45 N.Y.S. 2d 746 (1944), affirmed 293 N.Y. 915, 60 N.E. 2d 127; Sutton v. Courtney, 203 Okl. 590, 224 P. 2d 605 (1950).

In the Head Drilling Co. case, supra, the court said:

> We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature and occur under such circumstances as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such or should be regarded as an independent intervening cause is a question of fact for the Commission, to be decided in view of all the circumstances and its conclusion must be sustained by the courts whenever there is a reasonable theory evidenced by the record on which the conclusion can be upheld.

In the Prince Chevrolet Company case, supra, the court said:

> As to whether the disability resulted from a prior injury or is an aggravation of a prior injury or is caused by a new and independent

injury, is a question of fact solely within the province of, and for the determination of, the State Industrial Commission and if there be any competent evidence to sustain the finding, an award based thereon will not be disturbed. (Citing cases.)

In Maloney v. Utility Roofing Co., supra, which also involved two back injuries, the court said that even though the employee at the time of the second injury had not fully recovered from the first injury, the evidence authorized compensation for the second injury alone. Accord: Pittsburgh Plate Glass Co. v. Wade, 197 Okl. 681, 174 P. 2d 378 (1946).

Under the Longshoremen's and Harbor Workers' Compensation Act there is no such thing as apportioning compensation between two or more injuries since there is no method in the Act for computing compensation on such basis. Any attempt to do so would violate the fundamental purpose of the Act to compensate for wage-loss attributable to each injury. An employer takes an employee as he finds him; this is so held in the 9th Circuit under the Longshoremen's Act in Pac. Empl. Ins. Co. v. Pillsbury, 61 F. 2d 101. See also Great Atl. and Pac. Tea Co. v. Cardillo, 127 F. 2d 334; Trudenich v. Marshall, 34 F. Supp. 486; Wood Preserving Corp. v. McManigal, 39 F. Supp. 177.

Conclusion

In view of the above, it would appear that the compensation order complained of is in accordance

with law and that the complaint should be dismissed.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ F. N. CUSHMAN,
Assistant U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed April 20, 1955.

[Title of District Court and Cause.]

ORDER OF INTERVENTION

This matter coming on to be heard upon the motion of Employers Mutual Casualty Company of Des Moines, Iowa, to intervene in the above matter; and the court being fully advised in the premises

It is hereby Ordered that Employers Mutual Casualty Company of Des Moines, Iowa, a corporation, be permitted to intervene in the above-entitled proceeding.

Done in Open Court this 6th day of June, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ EDW. S. FRANKLIN,
Attorney for Defendant, Employers, Mutual Casualty Company.

Approved and Notice of Presentation Waived:

/s/ ROY E. JACKSON,
Attorney for Plaintiff.

/s/ F. N. CUSHMAN,
Attorney for Defendant, Asst. United States District Attorney.

[Endorsed]: Filed June 6, 1955.

Roy E. Jackson
Attorney at Law
1207 American Building
Seattle 4, Wash.
Eliot 2300

August 8, 1955.

Air Mail

Mr. Clarence L. Caldwell,
P. O. Box 84,
Seward, Alaska.

Re: Clarence L. Caldwell, Claimant,
Continental Fire and Casualty Ins. Corp.,
v. J. J. O'Leary, Deputy Commissioner,
District Court, No. 3880.

Dear Mr. Caldwell:

We have filed in the United States District Court on behalf of yourself and Continental Fire and Casualty Insurance Corporation, a Petition for Injunction against J. J. O'Leary, Deputy Commissioner, Longshoremen's and Harbor Workers' Compensation Commission, and Employers' Mutual

Casualty Co. of Des Moines. The attorneys for J. J. O'Leary and Employers' Mutual Casualty Co. of Des Moines have made a motion asking that you be dismissed as a party plaintiff in this case because your interest may be adverse to both the insurance companies and a ruling on behalf of either insurance company might be to your disadvantage. I believe we discussed this matter prior to the time you left Seattle for Alaska, at which time it was decided that a Petition for Injunction would be filed against Mr. O'Leary's decision.

In order to clarify your desire to have me represent you in this case, because of the fact that we do have a dispute between the two insurance companies with respect to who will pay the full bill, I would appreciate having you sign the authorization for me to represent you. This matter is coming up for hearing on Monday, August 15th, so it will be necessary for you to sign this letter of authorization for me to represent you, otherwise we will have your name dismissed as a party plaintiff.

Very truly yours,

/s/ ROY E. JACKSON.

REJ:ph

Dear Mr. Jackson:

Please be advised that it is my desire that you represent me in the above-captioned case now on file in the United States District Court of Washington, Northern Division, No. 3880.

/s/ CLARENCE L. CALDWELL.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on duly and regularly for hearing on August 15, 1955, on the Motion of the defendant and the Motion of the Intervenor for an order dismissing the above-entitled cause, plaintiffs being represented by Roy E. Jackson, their attorney, and defendant being represented by Charles P. Moriarty, United States Attorney, and Ed. J. McCormick, Assistant United States Attorney, and intervenor, Employers' Mutual Casualty Co. of Des Moines, being represented by Edward S. Franklin, of Bogle, Bogle & Gates, and the court having considered the arguments of counsel herein and having considered the records and files herein, enters the following:

Findings of Fact

I.

That plaintiff, Clarence L. Caldwell, was at all times material herein an employee of Northern Stevedoring and Handling Corporation of Seward, Alaska, and acted in the capacity of a longshoreman.

II.

That plaintiff Clarence L. Caldwell suffered an injury compensable under the Longshoremen's and Harbor Workers' Compensation Act on May 30, 1951, while in the employ of the Northern Stevedoring and Handling Corporation by reason of a

peavy slipping, causing him to fall backwards, striking his back against a piece of timber which caused pain in the back and resulted in his leaving work and being hospitalized and under medical treatment at Seward, Alaska. That compensation for this injury was received by plaintiff Caldwell from the Alaska Industrial Board but plaintiff's employer failed to report the injury to the Longshoremen's and Harbor Workers' Commission at the time or immediately following the injury.

III.

That thereafter plaintiff Caldwell filed a claim for compensation in the office of the Deputy Commissioner alleging injury on May 30, 1951, as aforesaid, which claim has not been adjudicated nor has there been any hearing thereon.

IV.

That on or about October 10, 1953, while in the employ of the Northern Stevedoring and Handling Corporation and while working on the S/S "Seafair" plaintiff Caldwell suffered an injury to his back while attempting to lift a crate which was about 4 feet long, 2 feet wide and 3 feet high, which crate weighed about five hundred pounds and as the result of that injury suffered pain in the low back and was sent to Seattle, Washington, for treatment. That the second injury was in the same general area of the first injury and plaintiff Caldwell had been suffering from pain and had worn a back brace between the time of the injury of May 30, 1951, and the injury of October 10, 1953.

V.

That claim was filed for the injury of October 10, 1953, and an award was made thereon finding disability arising out of the injury of October 10, 1953, and determining that no disability arose from the injury of May 30, 1951.

VI.

That the Continental Fire and Casualty Insurance Corp. appealed on the ground that there had been no hearing by the Commissioner on the claim following the first injury and no award made thereon and no determination of disability prior to the determination on the claim arising out of the injury of October 10, 1953.

VII.

That no challenge is made to the findings of the Deputy Commissioner by the plaintiffs herein.

Signed in Open Court this ..... day of August, 1955.

....., Judge.

From the Foregoing Findings of Fact, the Court Now Makes the Following:

Conclusions of Law

I.

That the Deputy Commissioner was not required by law to determine the claim of plaintiff arising out of the injury of May 30, 1951, prior to adjudi-

cating the claim arising out of the injury of October 10, 1953.

II.

That there is some evidence in the record upon which the Deputy Commissioner could base his findings relative to the disability of Clarence L. Caldwell on the injury of October 10, 1953, and the award must therefore be affirmed.

III.

That the Petition for Injunction herein should be dismissed.

Signed in Open Court this ..... day of August, 1955.

....., Judge.

Presented by:

/s/ ROY E. JACKSON,
Attorney for Plaintiff.

[Endorsed]: Filed August 18, 1955.

United States District Court, Western District of Washington, Northern Division

No. 3880

CLARENCE L. CALDWELL and CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION,

Plaintiffs,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Defendant,

and

EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Intervenor.

ORDER OF DISMISSAL

This Matter having come on duly and regularly for hearing on August 15, 1955, on the motion of the defendant and the motion of the intervenor for an order dismissing the above-entitled cause, plaintiffs being represented by Roy E. Jackson, Esquire, their attorney, and defendant being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington, and Edward J. McCormick, Jr., Assistant United States Attorney, his attorneys, and intervenor being represented by Edward S. Franklin, Esquire, its attorney, the Court having heard the arguments of counsel and having announced its oral decision that the motion to dismiss should be granted and that the above-

entitled action should be dismissed, now, therefore, it is hereby

Ordered that the motion to dismiss of the defendant and of the intervenor is granted and the above-entitled action be and it hereby is dismissed with prejudice.

Done in Open Court this 18th day of August, 1955.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ EDWARD J. McCORMICK, JR.,
Assistant U. S. Attorney.

Approved:

/s/ EDWARD S. FRANKLIN,
Attorney for Intervenor.

Approved as to Form:

.....,
Attorney for Plaintiffs.

[Endorsed]: Filed August 18, 1955.

Entered August 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Long-

shoremen's and Harbor Workers' Compensation Act, and to Charles P. Moriarty and Edward J. McCormick, Jr., United States Attorneys, and to Employers' Mutual Casualty Co. of Des Moines, Intervenor, and Edward S. Franklin and Bogle, Bogle & Gates, its attorneys, and to Millard Thomas, Clerk of the U. S. District Court for the Western District of Washington:

Please Take Notice that the Continental Fire and Casualty Insurance Corporation, plaintiff in the above-entitled action, does hereby give notice of appeal from that certain order of dismissal entered in Cause No. 3880 on the 18th day of August, 1955, by the Honorable John C. Bowen, from that portion of the judgment which recites:

> "That the motion to dismiss should be granted and that the above-entitled action should be dismissed, now, therefore, it is hereby ordered that the motion to dismiss of the defendant and the intervenor is granted and the above-entitled action be and it hereby is dismissed with prejudice."

Said appeal being taken to the United States Court of Appeals for the 9th Circuit.

/s/ ROY E. JACKSON,
Attorney for Plaintiff, Continental Fire and Casualty Insurance Corporation.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That we, Clarence L. Caldwell and Continental Fire and Casualty Insurance Corporation, the Plaintiffs above named, as Principals, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto J. J. O'Leary, Deputy Commissioner, 14th Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, Defendant in the above-entitled cause, in the sum of Two Hundred Fifty and No/100 Dollars ($250.00).

Sealed with our seals and dated this 12th day of September, 1955.

The Condition of This Obligation Is Such, that

Whereas, the District Court of the United States for the Western District of Washington, Northern Division, on the 18th day of August, 1955, in the above-entitled action Order of Dismissal was entered dismissing the action of plaintiffs and

Whereas, the above-named Principals have heretofore given due and proper notice that they appeal from said order to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, If the said Principals, Clarence L. Caldwell and Continental Fire and Casualty Insurance Corporation, shall pay all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and No/100 Dollars ($250.00), then this obligation to be void; otherwise to remain in full force and effect.

CLARENCE L. CALDWELL.

By /s/ ROY E. JACKSON,
His Attorney.

[Seal] CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION.

By /s/ MORRELL P. POLLEN.
UNITED PACIFIC INSURANCE COMPANY.

By /s/ A. L. WING, JR.,
Attorney-in-Fact.

[Endorsed]: Filed September 19, 1955.

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

To: J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and to Charles P. Moriarty and Edward

J. McCormick, Jr., United States Attorneys, and to Employers' Mutual Casualty Co. of Des Moines, Intervenor, and Edward S. Franklin and Bogle, Bogle & Gates, its Attorneys, and to Millard Thomas, Clerk of the U. S. District Court for the Western District of Washington:

Please Take Notice that the Continental Fire and Casualty Insurance Corporation, and Clarence L. Caldwell, plaintiffs in the above-entitled action, do hereby give notice of amendment to that certain notice of appeal filed in the above court on the 19th day of September, 1955, from that certain order of dismissal entered in Cause No. 3880 on the 18th day of August, 1955, by the Honorable John C. Bowen, from that portion of the judgment which recites:

> "That the motion to dismiss should be granted and that the above-entitled action should be dismissed, now, therefore, it is hereby ordered that the motion to dismiss of the defendant and the intervenor is granted and the above-entitled action be and it hereby is dismissed with prejudice."

Said appeal being taken to the United States Court of Appeals for the 9th Circuit.

/s/ ROY E. JACKSON,
Attorney for Plaintiffs.

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(O) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith the following original papers in the file dealing with the action, as the record on appeal from the Order of Dismissal filed Aug. 18, 1955, to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Injunction, filed Feb. 11, 1955.
2. Praecipe for service of copies of injunction, filed 2-11-55.
3. Summons with Marshal's Return of service thereon, filed 2-17-55.
4. Motion deft. to Dismiss, filed Apr. 20, 1955. (With transcripts 4a, 4b, 4c and 4d attached.)
8. Order of Intervention in behalf of Employers' Mutual Casualty Company of Des Moines, Iowa, filed 6-6-55.

Letter, Caldwell to Jackson, dated 8-8-55, re representation in filing suit.

14. Findings of Fact and Conclusions of Law as proposed by plaintiff, filed Aug. 18, 1955. (Unsigned.)

15. Order of Dismissal, filed Aug. 18, 1955.

16. Notice of Appeal, filed Sept. 19, 1955.

17. Bond for Costs on Appeal, filed Sept. 19, 1955.

18. Designation and Praecipe for Record on Appeal, filed Sept. 29, 1955.

19. Amended Notice of Appeal, filed Sept. 30, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for preparation of the record on appeal in this cause, to wit:

Filing fee, original Notice of Appeal at $5.00 and Amended Notice of Appeal, $5.00, and that said amounts have been paid to me by the attorneys for the appellants.

Witness my hand and official seal at Seattle, this 22nd day of October, 1955.

MILLARD P. THOMAS,
Clerk;

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 14921. United States Court of Appeals for the Ninth Circuit. Continental Fire and Casualty Insurance Company, Appellant, vs. J. J. O'Leary, Deputy Commissioner, Fourteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act and Employers' Mutual Casualty Co. of Des Moines, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 27, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14921

CLARENCE L. CALDWELL and CONTINENTAL FIRE AND CASUALTY INSURANCE CORPORATION,

Appellants,

vs.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, Under the Longshoremen's and Harbor Workers' Compensation Act,

Appellee,

and

EMPLOYERS' MUTUAL CASUALTY CO. OF DES MOINES,

Intervenor.

APPELLANTS' STATEMENT OF POINTS

1. When the claimant has sustained two injuries for which claims have been filed with the Commissioner and claimant has sustained disability as a result of both the first and the second injuries, the Commissioner is duty bound under the law to determine the disability incurred as a result of the first injury before making an award for disability caused by the second injury.

2. The Commissioner acted arbitrarily and capriciously in holding the second injury the sole cause of claimant's disability.

3. The Deputy Commissioner entered an order denying claimant compensation for his injury on May 30, 1951, without granting him a hearing on such claim.

4. That there is no evidence in the record which sustains that portion of the Findings of Fact which state: "That the injury of October 10, 1953, was the precipitating cause of the claimant's subsequent disability rather than the minor injury which he sustained on May 30, 1951."

5. That the Deputy Commissioner entered an award for disability on the injury of October 10, 1953, prior to disposal of a claim for injury on May 30, 1951.

6. That the compensation order was not in compliance with the law since it could not be properly entered fixing disability on the second injury without an order first being entered under the first claim determining the disability resulting from the first injury.

7. That the District Court entered an order dismissing the petition for injunction without considering the merits of the appeal and that such order was not in compliance with the law.

/s/ ROY E. JACKSON and

/s/ THOR P. ULVESTAD,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed November 10, 1955.